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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/689,267	10/20/2003	Triveni P. Shukla	00030-001	2893

7590 09/22/2004  
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EXAMINER

DONOVAN, MAUREEN C

ART UNIT PAPER NUMBER

1761

DATE MAILED: 09/22/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	10/689,267	SHUKLA ET AL.	
	<b>Examiner</b>	<b>Art Unit</b>	
	Maureen C Donovan	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☐ Responsive to communication(s) filed on 20 October 2003.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 1-5 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-5 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |   |   |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)             | 4) <input type="checkbox"/> Interview Summary (PTO-413)                     |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)    | Paper No(s)/Mail Date. _____  |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date _____   | 6) <input type="checkbox"/> Other: _____                                    |

**DETAILED ACTION**

***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

1. Claims 1,2,3,4,5 are rejected under 35 U.S.C. 102(b) as being anticipated by Baer, US patent number 5 011 701.

Baer discloses food products containing an aqueous dispersion comprised of a dietary fiber gel, water and lipid. Baer discloses that the food products are emulsified, or non-emulsified, pourable or viscous food dressing products, including mayonnaise (see Column 15, lines 33-41). Note that the Office interprets the reference to disclose vinaigrette dressing and creamy dressing. Baer discloses the use of the aqueous dispersion in a dressing mix (see Column 20-21, Example 4), wherein the emulsion is in a mix that is reconstituted with a starch base.

Baer discloses the use of microcrystalline cellulose (see Column 4, lines 31-33), which is a source of dietary fiber and is a gel in water, therefore is a dietary fiber gel. Baer discloses the use of a lipid with the dietary fiber gel (see Column 12, lines 43-63). Baer discloses adding the dietary fiber and lipid to water to form an aqueous dispersion (see Column 21, Example 5, lines 18-47) and then adding that aqueous dispersion to a food product as a fat replacement (see Column 2, lines 9-11 and 29-41 and see Column 20, Example 4). The aqueous dispersion as disclosed by Baer comprises a dietary fiber

gel, water and lipid; thus, it is the same as the emulsified liquid shortening composition, even though such term is not used in the reference. Baer discloses that the solids contained within the dietary fiber gel represent from about 0.25-4% by weight of the overall food formulation (see Column 14, lines 66-68 and Column 15, lines 1-2).

### ***Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

1. Claims 1-5 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-6 of copending Application No. 10/689269 in view of Baer.

Claims 1-5 of the instant application claim food comprising an emulsified liquid shortening composition comprising dietary fiber gel, water and lipid, wherein the emulsified liquid shortening composition comprising dietary fiber gel, water and lipid is added in a prorated amount such that solids contained within the dietary fiber gel represent 0.1 percent to 0.5 and 0.1 percent to 3.0 percent by weight of the overall food

formulation and the emulsified liquid shortening composition comprising dietary fiber gel, water and lipid replaces an equal amount of fat used in an otherwise identical recipe of food that uses no emulsified liquid shortening compositions comprising dietary fiber gel, water and lipid. The claimed matter of claims 1-5 of the instant application can be found also claimed in Application No. 10/689269 (see Application No. 10/689269, claims 1-6). Application No. 10/689269 claims that the solids contained within the dietary fiber gel represent 0.1 percent to 5.0 and 0.1 percent to 7.0 percent by weight of the overall food formulation, which encompasses the range as claimed in the instant application.

Application No. 10/689269 does not claim that the emulsified liquid shortening composition is used in dressings.

Baer teaches food products containing an aqueous dispersion comprised of a dietary fiber gel, water and lipid. Baer teaches that the food products are emulsified, or non-emulsified, pourable or viscous food dressing products, including mayonnaise (see Column 15, lines 33-41). Note that the Office interprets the reference to teach vinaigrette dressing and creamy dressing. Baer teaches the use of the aqueous dispersion in a dressing mix (see Column 20-21, Example 4), wherein the emulsion is in a mix that is reconstituted with a starch base.

It would have been obvious to one of ordinary skill in the art at the time of the invention to use the emulsified liquid shortening composition as claimed in Application No. 10/689269 in dressings as taught by Baer since both are directed to dietary fiber gels as food fat substitutes and since using the high fiber gel in a dressing would impart

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a well rounded fat mimetic mouth feel characteristic, as well as desirable stability and functionality characteristics (see Baer, Column 2, lines 33-35).

This is a provisional obviousness-type double patenting rejection.

### ***Conclusion***

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

McGinley et al, US patent 5 192 569, discloses an aqueous dispersion comprising dietary fiber gel, water and lipid.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Maureen C Donovan whose telephone number is (571) 272-2739. The examiner can normally be reached on 8:30-5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

MCD



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